



INTERIOR BOARD OF INDIAN APPEALS

State of South Dakota and County of Charles Mix v. Acting Great Plains Regional Director,
Bureau of Indian Affairs

49 IBIA 129 (04/30/2009)

Judicial review of this case:

Aff'd, County of Charles Mix v. U.S. Dept. of the Interior, 799 F. Supp. 2d 1027 (D.S.D. 2011),
aff'd., 674 F.3d 898 (8th Cir. 2012)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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STATE OF SOUTH DAKOTA and)	Order Affirming Decision
COUNTY OF CHARLES MIX,)	
Appellants,)	
)	
v.)	Docket No. IBIA 07-115-A
)	
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	April 30, 2009

The State of South Dakota (State) and the County of Charles Mix (County) (collectively, Appellants) have jointly appealed the May 22, 2007, decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), approving the August 26, 2004, decision of the Acting Superintendent (Superintendent), Yankton Agency, BIA, to accept approximately 39 acres in trust for the Yankton Sioux Tribe (Tribe) for economic development and self-determination. This property, commonly referred to as the “Yankton Sioux Travel Plaza” (Travel Plaza) is legally described as Lot 1 (also known as NE $\frac{1}{4}$ NE $\frac{1}{4}$), less Lot H-1, sec. 1, T. 95 N., R. 65 W., 5th Principle Meridian, Charles Mix County, South Dakota, and is currently used for a gas station, a convenience store, and agricultural leasing.¹ Because Appellants have not shown that the process utilized by BIA violated their due process rights or that the Regional Director’s decision was erroneous or reflected an improper exercise of his discretion, and because the administrative record demonstrates that the Regional Director considered each of the relevant criteria in 25 C.F.R. § 151.10 and reasonably exercised his discretion, we affirm the Regional Director’s decision.

¹ The land embraced by the Truck Plaza apparently was originally allotted to Anna Kutena Wahcahunka, a member of the Tribe. She received a fee patent to the land in 1916 and sold the land in 1919. The Tribe purchased the land from Charles J. and Alice M. Fuchs in 1992.

Statutory and Regulatory Background

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land for Indians in his discretion. The regulations governing acquisitions of trust land permit such action “[w]hen the Secretary determines that the acquisition . . . is necessary to facilitate tribal self-determination, economic development, or Indian housing.” 25 C.F.R. § 151.3(a)(3). In evaluating requests to acquire land located within or contiguous to an Indian reservation, BIA must consider the criteria set forth in 25 C.F.R. § 151.10(a)-(h).² These criteria are:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
- (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National

² Requests for off-reservation trust acquisitions are controlled by 25 C.F.R. § 151.11, which requires the Secretary to consider the criteria listed in 25 C.F.R. § 151.10 plus additional factors.

Factual and Procedural Background

Fee-to-Trust Application and Review by the Superintendent

By Resolution No. 2004-019, dated March 1, 2004, the Tribe's Business and Claims Committee (Committee) requested that the Superintendent approve a fee-to-trust acquisition of the 39-acre Travel Plaza. Administrative Record (AR), Tab 53.³ The resolution stated that the Committee was responsible for providing economic development for the Tribe and its members, that the Tribe currently operated a gas station and a convenience store on the property, and that the use of the property would remain the same. As directed by 25 C.F.R. § 151.10,⁴ the Superintendent notified the State, the County, and other affected local governmental bodies by letters dated March 19, 2004, that the Yankton Agency was considering an application from the Tribe to take the Travel Plaza into trust. The Superintendent solicited comments on the proposed acquisition, including the annual amount of property taxes levied on the property, the anticipated impact on the governments resulting from the removal of the property from the tax rolls, any special assessments and the amounts thereof currently assessed against the property, any governmental services currently provided to the property, and if and how the property was zoned and any potential land use conflicts that might arise. AR, Tab 52.

³ The Tribe had previously submitted Resolution No. 2002-44, dated May 2, 2002, in which the Tribe requested the trust acquisition of 27 parcels, including the Travel Plaza, which was listed as Parcel 27 and identified as "FUCHS LAND" to reflect the name of the individuals who had sold the land to the Tribe. *See* AR, Tabs 59 and 60.

⁴ In relevant part, 25 C.F.R. § 151.10 provides that
[u]pon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments.

The regulation also requires BIA to provide to the applicant any state or local government comments and afford the applicant an opportunity to respond to those comments or request that the Secretary issue a decision.

On March 26, 2004, prior to submitting its comments, the State filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking copies of the trust acquisition application, any further communications between BIA and the Tribe concerning the application, and any other documentation in the case file regarding the application. AR, Tab 51. BIA responded on April 12, 2004, providing Tribal Resolution No. 2004-019. AR, Tab 48.

The State and the County each provided comments opposing the trust acquisition. AR, Tabs 45 and 46. The State's opposition letter raised several arguments, focusing on the Tribe's failure to supply any of the information necessary for BIA to evaluate the criteria set out in 25 C.F.R. § 151.10. The State further contended that the acquisition was an off-reservation acquisition and that the Tribe therefore was required to satisfy the additional requirements of 25 C.F.R. § 151.11, which the State averred that the Tribe had failed to do. The State also requested that, if the Superintendent sought any additional information from the Tribe pursuant to 25 C.F.R. § 151.12, the State be supplied with copies of that information and afforded a reasonable amount of time to reply.

In addition to joining the State's comments, the County stated that the current annual tax levy on the property was \$6,423, \$2,440.74 of which went to the County, with the remainder distributed to White Swan Township (\$321.15), the Andes Central School (\$3275.73), the Wagner/Lake Andes Ambulance Service (\$128.46), the Lake Andes/Ravinia Fire District (\$192.69), and the Water Conservancy (\$64.23). The County contended that the loss of taxes would negatively impact its ability to provide services, including law enforcement, courts, elections, licensing, titling, recording legal documents, veterans' services, emergency disaster services, a communications center (E911), public works (roads, bridges, etc.), poor relief, a county health nurse, a mental health center, and conservation. The County also questioned the wisdom of considering the acquisition while the status of the affected land as Indian country was being litigated in Federal court.⁵

On August 26, 2004, the Superintendent issued identical decision letters to the State, the County, and the other affected local governmental entities, stating BIA's intent to

⁵ Although the lawsuit was pending when these comments were submitted, the U.S. District Court has now issued a ruling, determining, *inter alia*, that land taken into trust pursuant to the IRA that is located within the original 1858 treaty boundaries of the Yankton Sioux Reservation constitutes part of the Tribe's reservation and Indian country within the meaning of 18 U.S.C. § 1151(a). *Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040, 1042 (D.S.D. 2007), *appeal pending*, No. 08-1441 (8th Cir.) (*Podhradsky*).

acquire the Travel Plaza in trust for the benefit of the Tribe. AR, Tab 42. She evaluated the factors set out in 25 C.F.R. § 151.10, finding that (1) the land was being acquired pursuant to the IRA, 25 U.S.C. § 465, which authorizes the acquisition of land in trust for the Tribe, and 25 C.F.R. § 151.3, which authorizes the acquisition of land in trust for the purpose of facilitating tribal self-determination and economic development; (2) the need for the acquisition was to assist the Tribe in maintaining its cultural, social, and health programs through economic development, to promote tribal self-government and self-sufficiency, to help the Tribe maintain growth on the Reservation, and to enhance much needed job opportunities while providing a service to the public; (3) the land would continue to be used as a convenience store and/or business site by the Tribe; (4) the impact of the removal of the tax assessment on the property would be minimal and mitigated by the Tribe and/or BIA providing the services currently provided by the County and by possible increased Federal payments to the school district; (5) no jurisdictional problems were anticipated because the land was within the exterior boundaries of the Yankton Sioux Reservation and because civil and criminal jurisdiction would be identical to that of any other tract of land held in trust; and (6) BIA was equipped to handle the additional responsibilities, citing the contractual agreements between the Tribe and the Wagner, Lake Andes, and Ravinia Fire Departments, and the technical service and support available from the Great Plains Regional Office. Accordingly, the Superintendent determined to take the land into trust for the benefit of the Tribe.⁶

After receiving the Superintendent's decision, the State submitted a new FOIA request to BIA, dated September 2, 2004, seeking documents of any kind added to the case file after BIA's response to the State's March 2004 FOIA request, including any supplement to the Tribe's trust application, any further communications or other communications to or from the Tribe or any other person or entity regarding the application, and any other documentation of any kind in the file relating to the application. AR, Tab 40. BIA responded by letter dated October 1, 2004, stating that the responsive documents were attached to the letter; those documents, however, are neither identified nor attached to the copy of the letter in the AR. *See* AR, Tab 34.

⁶ The Level I Environmental Site Assessment (ESA) and categorical exclusion checklist, prepared to comply with the requirements of that National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C), identified in 25 C.F.R. § 151.10(h), were completed on September 29, 2004, subsequent to the Superintendent's decision. AR, Tabs 35-37.

Appeal to the Regional Director

The County and State timely appealed the Superintendent's decision. AR, Tabs 38, 39. They each filed a separate Statement of Reasons (SOR), which incorporated by reference the SOR submitted by the other. AR, Tabs 32, 33. The County's SOR reiterated the issues raised in its earlier comments, focusing on the ramifications of the loss of tax revenue on its ability to provide services, and restated its opposition to processing the application prior to resolution of the Federal lawsuit addressing the Indian country status of the land if it were placed in trust. The County also averred, without discussion, that placing the land into trust would be unconstitutional. The State filed a more extensive brief, again challenging the sufficiency of the Tribe's application under 25 C.F.R. §§ 151.9 and 151.10.⁷ The State also objected to the Superintendent's failure to respond to its arguments and comments, and disputed the Superintendent's evaluation of the factors in 25 C.F.R. § 151.10.

To facilitate consideration of the appeals, the Regional Office requested additional information from the County, the State, and the Superintendent. AR, Tabs 28-30. The February 16, 2005, letters to the County and State requested supplemental information about the total acreage each jurisdiction taxed and the total amount of taxes assessed and received each year, especially 2004. AR, Tab 29, 30.⁸ The State and the County submitted additional information. AR, Tabs 24, 26. The County stated that its total taxable acreage was 641,000 acres, excluding city residential and commercial parcels, and that the total amount of annual taxes assessed in 2004 was \$8,150,870.05, with the County receiving \$2,744,775.00 of that amount, and that the 2004 tax levy for the Travel Plaza was \$6,260.10. AR, Tab 26.⁹ The State estimated that the total taxable acreage within the County was approximately 640,000, including 638,732.13 acres of taxable land outside of municipal boundaries and roughly 2,300 acres within municipal boundaries. The State indicated that a total of \$7,764,209.80 had been paid as County taxes in 2004, with the

⁷ In accordance with 25 C.F.R. § 151.9, a tribe seeking to acquire land in trust must provide a written request for approval of that acquisition; that request, however, "need not be in any special form but shall set out the identify of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." 25 C.F.R. § 151.9.

⁸ Because the record did not contain any evidence that the Tribe had been notified of and offered the opportunity to comment on the County's and State's objections, the Regional Director forwarded copies of those objections to the Tribe and granted it 30 days to respond to the objections. AR, Tab 27. No response from the Tribe appears in the record.

⁹ Both the County and the State acknowledge that they had previously misstated the amount of the annual taxes for the Travel Plaza.

County receiving \$3,904,483.88 of that amount. The State added that there already were 36,700 acres of trust land in the County, encompassing 5.4 percent of the County's total tax base, and that the loss of tax revenue from the Travel Plaza would be permanent and cumulative if the property were taken into trust. The State also averred that the Tribe had significant annual gaming revenue, received Federal money for various services, and therefore was easily able to pay the minimal taxes assessed for the property and did not need to have the land placed in trust. AR, Tab 24.

The Superintendent also responded to the request for additional information. Her submissions included an approved copy of the Level I ESA and NEPA categorical exclusion; copies of the June 29, 1994, fire protection agreement between BIA and the Lake Andes-Ravinia fire district; the April 12, 1993, fire protection agreement between BIA and the Wagner fire district (which was approved on January 3, 1994); the July 29, 2004, BIA requisition form for dispatch services and housing of prisoners provided by the County Law Center and the Statement of Work for those services; and the certificate of inspection and possession for the Travel Plaza property. In response to specific questions asked by the Regional Director, the Superintendent provided written statements, indicating that once the property had been placed in trust status, the current fire protection agreements between BIA and the cities of Wagner, Ravinia, and Lake Andes would remain in effect; that ambulance services would continue to be provided by the Wagner ambulance service in conjunction with the Indian Health Service (IHS) on a cost reimbursable basis; that the Statement of Work between BIA law enforcement and the County Law Enforcement Center covered 911 emergency calls; and that BIA's Office of Justice Services (OJS) personnel would have criminal and patrol responsibilities for the acquired land. She further submitted information addressing the distances of the Travel Plaza from the fire, police, ambulance, and health services, and from the City of Wagner; the Tribe's payment for natural gas and electricity; and the property's current partial use for agricultural purposes. See AR, Tabs 9, 12, 19.

The Regional Director's Decision

In his May 22, 2007, decision, the Regional Director reviewed the trust acquisition request pursuant to the criteria set out in 25 C.F.R. § 151.10(a)-(c) and (e)-(h) as an on-reservation trust acquisition. AR, Tab 8.¹⁰ As to factor (a), the statutory authority for the acquisition, the Regional Director determined that the acquisition was authorized by the IRA, 25 U.S.C. § 465. Considering factor (b), the Tribe's need for additional land, he

¹⁰ He did not consider factor (d) of subsection 151.10, which applies only to land acquired in trust for an individual Indian.

determined that the acquisition would help the Tribe maintain its cultural, social, and health programs through economic growth, as well as promote self-sufficiency and self-government by providing much needed economic development and business and job opportunities to both tribal and non-tribal members, all while providing a necessary service to the public. He also observed that the tribal population had increased by 15 percent over the past 10 years without an increase in trust lands; that the property's proximity to the Tribe's Fort Randall casino would aid tribal land consolidation efforts; and that trust status might qualify the Tribe for additional Federal funding for important social or economic programs or other benefits not available to land in fee status. As to factor (c), the purpose for which the land would be used, the Regional Director pointed out that the land currently was being utilized for economic development including a truck plaza and farm land and would continue to be used for those purposes.

Addressing factor (e), the impact on the State and its political subdivisions resulting from removal of currently unrestricted fee lands from the tax rolls, the Regional Director stated that, although the County would lose \$6,260.10 in annual tax revenue, that loss would be mitigated by BIA's and/or the Tribe's absorption of some of the services the County currently provides, including law enforcement responsibilities, tribal health services, and document recording services. As to the other services the County stated it was now providing, he noted that ambulance services and health care would continue to be provided by IHS; that BIA pays \$38,000 per year by contract to the County for dispatch services; that the Tribe would continue to pay a fee for 911 services on all land line phones located on the property; that the Tribe pays the Randall Community Water District monthly water fees and owns and maintains its own sewage services to the convenience store; and that the current payments for electrical services would not change. The Regional Director found that the County's annual tax budget was \$2,744,755 and concluded, therefore, that the loss of \$6,260.10 amounted to a less than ".01 percent decrease," which was not a significant amount.¹¹

Considering factor (f), jurisdictional problems and potential conflicts of land use, the Regional Director determined that there would be no land use conflicts. He acknowledged, however, that there would be jurisdictional issues, just as there were between cities and counties, but stated that, once the land is in trust, it would be treated the same as other trust land within the boundaries of the Reservation, and that one piece of property would not further affect any existing jurisdictional problems. As to factor (g), whether BIA was equipped to discharge the additional responsibilities resulting from the acquisition of fee

¹¹ It appears that the Regional Director's decision contained a typographical error because the loss of \$6,260.10 is actually approximately 0.2 percent of the County's budget.

lands into trust status, the Regional Director determined that BIA was capable of assuming those functions, pointing out that, since BIA already provided administrative services in the County, the addition of another 39 acres would have a minimal effect on the Yankton Agency staff and services, especially since Regional Office would be able to provide any needed technical support and assistance. He also cited the 10-minute response time for police and ambulance services, the cost-reimbursable ambulance services agreement, and the fire protection agreements as supporting BIA's ability to assume the additional responsibilities associated with acquiring the property in trust. Finally, addressing factor (h), NEPA compliance and hazardous substance determinations, the Regional Director concluded that the environmental site assessment and the NEPA categorical exclusion satisfied those obligations.

The Regional Director then extensively evaluated the issues addressed in the State's and the County's comments and SORs. After noting that several issues were not addressable at the administrative level, including the constitutionality of the IRA and the on-going Federal court litigation over the definition of "Indian country," he turned to the State's objections to the trust acquisition. The Regional Director first responded to the State's FOIA-related arguments, concluding that the Superintendent had fully complied with FOIA and its implementing regulations at 43 C.F.R. Part 2, which only require the release of the documents the agency actually has. He posited that BIA most likely was in the process of gathering the information on the fee-to-trust application and had not received all the information at the time the State made its FOIA requests, which resulted in the State not having all the documentation BIA eventually used to make its decision. Regardless, he pointed out that FOIA had its own administrative appeal process distinct from the trust acquisition appeal process.

The Regional Director found the State's objections to the sufficiency of the Tribe's fee-to-trust application and to the authority of the Committee to submit the application to be without merit. He stated that BIA did not interpret its regulations to require that all documentation had to be submitted with the application, pointing out that 25 C.F.R. § 151.12 explicitly allows the Secretary to seek more information to enable him to make an informed determination, and noting that no formal application form is required for a trust acquisition.

The Regional Director also rejected the State's claim that the criteria in 25 C.F.R. § 151.10 were not addressed, noting that both the Superintendent's decision and his decision addressed these factors. While he acknowledged that the Superintendent had not discussed the objections to the acquisition, the Regional Director pointed out that his decision cured that omission. Specifically, as to the need for the land, the Regional Director expanded his own earlier analysis by adding that, without having to pay yearly taxes, the

Tribe would still be able to serve the public's needs with the convenience store while using the saved money to fund programs meeting the Tribe's other needs. He dismissed the State's assertion that the Superintendent should have considered the cumulative tax loss from all trust lands over the long term, observing that the regulations do not require BIA to consider those losses. The Regional Director found no merit in the State's contention that the Superintendent erred in failing to consider the jurisdictional issues regarding the removal of the property from fee status and the question of whether the property would be considered Indian country, and concluded that the Superintendent had correctly determined that the acquisition was an on-reservation acquisition. He further indicated that, regardless of the outcome of the present Federal court litigation, BIA considered this property to be within the boundaries of the Yankton Sioux Reservation for purposes of applying the on-reservation fee-to-trust criteria of 25 C.F.R. § 151.10. The Regional Director explained that once the land is in trust status, it would have the same legal status as the remaining 36,741 acres of the Tribe's trust land. He also pointed out that the Tribe, County, and other local jurisdictions already had to work together on jurisdictional matters, which would not increase or otherwise change when the land went into trust status.

The Regional Director rejected the State's claim that BIA was not equipped to manage the land once in trust, noting that the *Cobell v. Norton* lawsuit (now *Cobell v. Salazar*, Civil Action No. 96-1285 (JR) (D.D.C. Sept. 4, 2008) (*Cobell*), *appeal pending*, No. 08-8011 (D.C. Cir.)), cited by the State, dealt with BIA's management of trust accounts and trust money while here the Tribe, not BIA, would manage its business affairs and income. He further noted that the January 2002 Office of the Inspector General (OIG) Report entitled *Disquieting State of Disorder: An Assessment of Department of the Interior Law Enforcement* (OIG Report) on the inadequacies of BIA law enforcement, also cited by the State, did not reflect any specific Yankton Agency law enforcement issues but rather was a nation-wide report. As to the purported lack of a contractual agreement with the Wagner Fire Department evidenced by the failure to produce such an agreement in response to the State's FOIA request, the Regional Director posited that BIA may simply not have had a copy of that document in the record at the time of the request. While recognizing that the Superintendent did not address 25 C.F.R. § 151.10(h) regarding NEPA compliance, the Regional Director noted that he had addressed that factor and had concluded that the acquisition complied with NEPA. In short, based on his review of the record, which included the additional information gathered on appeal, the Regional Director upheld the Superintendent's decision.

The Regional Director similarly rejected the State's remaining objections. He found that the State had not identified any services it claimed that it and the County would still be responsible for providing when the land is taken into trust, nor had the State documented its contention that disputes would arise over the fact that gas sold at the gas station would

be untaxable by the State, at least for tribal members, which would exacerbate tensions between Indians and non-Indians. The Regional Director observed that the Reservation once included all of what is now the County (approximately 679,000 acres), but had subsequently been reduced to approximately 37,000 trust acres, or approximately 5 percent of the former Reservation, and that, given the existing jurisdictional issues, the Tribe, the County and other local governmental units currently had to work together for the benefit of the community. Although the State suggested that 14 acres per enrolled tribal member (39,000 acres ÷ 2,633 resident tribal members) was adequate, the Regional Director noted that the State had omitted the land needed for tribal agricultural use, range use, housing, or governmental use. He further discounted the State's assertions that the Tribe's receipt of significant gaming revenues and direct Federal funds and its employment of 600 persons in the casino undermined any worry that the Tribe might not be able to pay the assessed property taxes, adding that BIA was not required to consider such elements in a fee-to-trust acquisition. He also disputed the State's insistence that this proposed acquisition was an off-reservation transaction, citing 25 C.F.R. § 151.2(f) as support for BIA's conclusion that the acquisition was an on-reservation acquisition.¹² Finally, the Regional Director denied the State's request that it be given copies of all documents gathered on all fee-to-trust transactions as unauthorized and unduly burdensome, explaining that the State was allowed to obtain the entire administrative record on appeal for the present fee-to-trust acquisition upon written request to the Regional Office, and to make comments on the acquisition pursuant to 25 C.F.R. § 151.10.

Turning to the County's objections, the Regional Director discounted the County's contention that removing the land from the tax base would shift the tax burden to the remaining landowners or force services to be scaled back, finding that the County had not articulated how much the fees would be increased on other landowners or how any reductions would be implemented. He also dismissed the County's reference to the tax losses from other tribal trust acquisition applications as irrelevant to his consideration of the impact of the \$6,260.10 annual tax loss from this specific transaction. The Regional Director examined and countered each of the services the County had indicated it was providing to the property. The Regional Director therefore concluded that, although the County would lose tax revenue, that loss would be mitigated by the elimination of its

¹² "Indian reservation" is defined in 25 C.F.R. § 151.2(f) as that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary.

responsibility for providing some costly services. As to the County's jurisdictional and zoning concerns, the Regional Director found that, once the land had been taken into trust, it would be treated like all other trust land within the Reservation, and that, while not subject to the County's zoning laws, the Tribe would be responsible for meeting any Federal requirements for pertaining to the management of the property. Finally, the Regional Director again reiterated that Federal regulations did not require BIA to consider the cumulative tax loss to the County for existing trust land, and dismissed as unsupported the County's claim that the tax loss from this property would render the County less able to provide and maintain new or improved infrastructure in the County.

In further support of the decision to acquire the property in trust, the Regional Director cited BIA's existing agreements with the Lake Andes-Ravinia Fire District and with the Wagner Fire District to provide fire protection services on all trust lands; OJS's assumption of criminal jurisdiction and patrol responsibility for the Travel Plaza; the Statement of Work between BIA law enforcement and the County for detention and dispatch services; and IHS' cost-reimbursement arrangement with the Wagner-Lake Andes Ambulance program. In conclusion, the Regional Director explained:

Although the Tribe participates in gaming, it should not be a factor in approving this fee-to-trust acquisition. As a general rule, there is no guarantee that gaming will continue to be a viable economic option for the Tribe in the future. This trust land will provide for business economic development and self-determination for the Tribe and its members in association with the convenience mart. This trust acquisition will help insure the survival of the Tribe as a sovereign nation by providing protected lands for their current and future generations. In addition, this trust acquisition will promote tribal self-determination by allowing the Tribe to operate its own tribally-owned business on the subject lands.

I have determined that the removal of this property from the County tax base will have a minimal [effect] on the County, City and State governments. I have concluded that there is legal authority to take this subject land into trust and that this trust acquisition meets the requirements of [151.10(a)-(h)], as an on-reservation fee-to-trust transaction.

Decision at 11-12. He therefore upheld the Superintendent's decision to approve the Tribe's fee-to-trust application and take the property into trust.

Appellants filed a timely notice of appeal and submitted an opening brief. The Regional Director filed an answer brief, and Appellants submitted a reply brief responding

to BIA's answer brief. Appellants subsequently submitted a motion to allow the filing of a second supplemental brief to address the impact on this appeal of the district court's decision in *Podhradsky*, and a supporting brief; the Regional Director opposed Appellants' motion. We grant Appellants' motion and have considered both Appellants' supplemental brief and the Regional Director's opposition. Briefing is now complete and the case is ready for Board review.

Standard of Review

The standard of review in trust acquisition cases is well established. Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment for BIA's judgment in discretionary decisions. *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006); *Cass County v. Midwest Regional Director*, 42 IBIA 243, 246 (2006). Instead, the Board reviews discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of BIA's discretionary authority, including any limitations on its discretion that may be established in regulations. *Arizona State Land Department*, 43 IBIA at 160. Thus, proof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor. *See id.*; *Eades v. Muskogee Area Director*, 17 IBIA 198, 202 (1989). Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed. *Jackson County v. Southern Plains Regional Director*, 47 IBIA 222, 231 (2008); *Aitkin County v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008); *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Department of the Interior*, No. 07 C 0543 S (W.D. Wis. May 29, 2008). Moreover, an appellant bears the burden of proving that BIA did not properly exercise its discretion. *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246; *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff'd sub nom. South Dakota v. U.S. Dep't. of the Interior*, 401 F. Supp.2d 1000 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007). Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246-47.

In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review any legal issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations, which the Board lacks authority to adjudicate. *Jackson County*, 47 IBIA at 227-28; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247. An appellant, however, bears the burden of proving

that BIA's decision was in error or not supported by substantial evidence. *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247.

Discussion

On appeal, Appellants challenge both the procedures BIA used to reach its decision and the merits of that decision. We find that Appellants have failed to meet their burden of showing error in either the process used by BIA or the merits of the Regional Director's decision. We therefore affirm the Regional Director's decision.

Appellants' procedural issue raises the question of

whether the opponents to an application to take land in trust are entitled, under principles of constitutional law, under the precedent of this Board, and under the Code of Federal Regulations, to the information and documentation which BIA *will* consider in making its land-to-trust determination and are entitled to respond to any evidence submitted in support of the application.

Opening Brief at 1-2 (emphasis added). They contend (1) that the process followed by BIA violated their due process rights by depriving them of their opportunity to address critical arguments and information before both the Superintendent and the Regional Director; (2) that they were harmed because they were not timely provided information and thus were unable to make timely arguments;¹³ (3) that principles of constitutional law require that adequate notice of the materials to be relied upon by BIA be given to the State and County before BIA makes its initial decision; (4) that the Board demands due process for litigants before BIA; (5) that principles of exhaustion of administrative remedies demand that the State and local units of government be given a reasonable time to review and comment on any new documentation and information received by BIA prior to the time it makes a fee-to-trust acquisition determination; and (6) that BIA failed to give adequate notice of the materials it relied upon pursuant to applicable principles of Federal law.

Opening Brief at 2-21. These arguments are identical to the arguments these Appellants made, and the Board rejected, in *State of South Dakota, County of Charles Mix, and City of*

¹³ Appellants argue that they were deprived of the opportunity to challenge the times and distances provided by BIA; the Regional Director's reliance on the 15 percent increase in tribal population, on the fire agreements, and on the Committee's authority submit the fee-to-trust acquisition application; the sufficiency of the environmental documents; and the relevance of the \$38,000 BIA pays for dispatch services.

Wagner v. Acting Great Plains Regional Director, 49 IBIA 84 (2009) (*South Dakota*). Appellants have not presented any arguments or Board precedent that undermines our comprehensive analysis of these issues in that decision. We therefore reject Appellants’ procedural arguments here for the reasons set out in *South Dakota*.¹⁴

As to the merits, Appellants aver that BIA made numerous errors of law and fact. Appellants contend (1) that BIA’s determination of need was not reasonable because the Tribe has sufficient income to preclude it from needing the land in trust to eliminate its obligation to pay taxes on the property;¹⁵ (2) that BIA erred as a matter of law and in the exercise of its discretion regarding jurisdictional problems by equating the jurisdictional issues between Appellants and the Tribe with those between cities and counties, by failing to confront the already existing and additional jurisdictional problems associated with the fee-to-trust application, by confusing the regulatory definition of Indian reservation found in 25 C.F.R. § 151.2(f) with the statutory definition established at 18 U.S.C. § 1151(a), and by minimizing the import of the Federal court litigation then pending in *Podhradsky*; (3) that the Regional Director failed to establish that BIA was equipped to manage these lands, citing *Cobell* and the OIG Report; (4) that the Regional Director’s determination was irrational because it did not consider the cumulative tax lost to local units of government resulting from the all existing trust land within the County; and (5) that the Regional Director should not have accepted a fee-to-trust application filed by the Committee because the Committee lacks the authority to take land into trust. Opening Brief at 21-32; Reply Brief at 7-11. As was the case with Appellants’ procedural arguments, these substantive arguments are identical to the substantive arguments Appellants raised and the Board rejected in *South Dakota*. Again Appellants have presented no evidence or arguments controverting our extensive analysis of these issues (and the numerous other issues raised or postulated) in that decision, and we reject these arguments for the reasons comprehensively explained in *South Dakota*.¹⁶

¹⁴ We note that Appellants had the opportunity to brief the objections they claim they were unable to make before the Regional Director in their appeal to this Board.

¹⁵ Appellants claim that “the heart” of the Regional Director’s assessment of the Tribe’s need for the land is the tax savings the Tribe will realize. Appellants, however, overlook the Regional Director’s two-paragraph consideration of the Tribe’s need for the land to maintain economic growth, in which he determined that the acquisition will promote the Tribe’s self-government and self-sufficiency. Decision at 2.

¹⁶ The fact that the need for the additional land in *South Dakota* was, *inter alia*, to provide housing for tribal members while the need for the property here is, *inter alia*, to provide
(continued...)

We now turn to the two additional issues raised by Appellants. First, Appellants argue that a November 14, 2005, letter from the Committee Chairman to Regional Director William Benjamin (AR, Tab 14), stating that “[t]his action is almost a decade old and I know that you made a commitment to the past Yankton Sioux Tribal Council to champion this cause on our behalf,” and that the Tribe “hope[s] and [is] counting on you to continue to honor that promise,” demonstrates such bias that the Regional Director should not have acted on this matter. William Benjamin, however, was not the Regional Director who signed the decision on appeal. Appellants do not direct us to any evidence, apart from the November 14 letter, that demonstrates Benjamin’s involvement in this appeal, nor do we see any such evidence in the record. Thus, it appears that he did not act on the matter and Appellants’ argument fails on its face. And the record demonstrates that the Regional Director who did sign the decision independently assessed the application and appeal and considered all the requisite criteria set out in 25 C.F.R. § 151.10.¹⁷

Further, to the extent Appellants are claiming that the administrative process has a built-in structural bias in favor of the Indians that negates the impartiality and fairness of the process, that argument has been squarely rejected by the courts. The U.S. District Court addressed the issue of an alleged inherent bias in favor of applicants in trust decisions in *South Dakota v. U.S. Dep’t. of the Interior*, 401 F. Supp.2d 1000 (D. S.D. 2005), *aff’d*, 487 F.3d 548 (8th Cir. 2007). In that decision, the court explicitly found that BIA’s policies of tribal self-determination, Indian self-government, and hiring preferences for Indians were policies established by Congress in the IRA, and that the U.S. Supreme Court had found the preference policy reasonable and rationally designed to further Indian self-government and not violative of due process. 401 F. Supp.2d at 1011, *citing Morton v. Mancari*, 417 U.S. 535, 542, 555 (1974). The court therefore held that “[f]ollowing Congress’s statutory policies does not establish structural bias warranting reversal of the Director’s decision.” 401 F. Supp.2d at 1011. Thus, Appellants have not shown that the Regional Director’s decision was tainted by improper bias that denied them due process.

¹⁶(...continued)

economic development for the Tribe does not undermine the applicability of our decision in *South Dakota* to the proposed acquisition of the Travel Plaza.

¹⁷ Of course, even if Benjamin had issued the decision, it would not follow that the *Tribe’s* characterization of Benjamin’s purported “commitment” would suffice to demonstrate that Benjamin could not, as a Federal official, fulfill his obligation to fairly consider the matter on the merits, once all of the evidence and arguments were presented to him.

Finally, in the “Second Supplemental Brief” appended to Appellants’ motion to allow the filing of a second supplemental brief, Appellants aver that the U.S. District Court’s decision in *Podhradsky* supports their claim that the proposed fee-to-trust acquisition is an off-reservation acquisition that should have been analyzed under 25 C.F.R. § 151.11, rather than under 25 C.F.R. § 151.10. In making this argument, Appellants interpret the court’s holding in *Podhradsky*, 529 F. Supp.2d at 1054, that lands within the original 1858 treaty boundaries of the Yankton Sioux Reservation taken into trust under the IRA constitute the Tribe’s reservation and “Indian country” under 18 U.S.C. § 1151(a), as meaning that land for which a fee-to-trust application has been submitted to BIA does not become “Indian reservation land” *until* it has been taken into trust. Therefore, according to Appellants, an application for such land must be analyzed as an off-reservation trust acquisition.

In making this argument, Appellants cite the first portion of the definition of “Indian reservation” set out in 25 C.F.R. § 152.2(f), which provides that a reservation means “that area of land over which the tribe is recognized by the United States as having governmental jurisdiction.” Appellants minimize the import of the remainder of the definition — “except that, . . . where there has been a final judicial determination that a reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary” — which they construe as applying only to tribes with *no* reservation. They cite no support for such a contention. The Board has previously rejected that argument, finding that, even if there has been a judicial determination of disestablishment (or diminishment, as was the case here), the tract will still be considered on-reservation for purposes of 25 C.F.R. Part 151 because the definition of Indian reservation in 25 C.F.R. § 151.2(f) expressly includes those lands “constituting the *former* reservation of the Tribe.” *Mille Lacs*, 37 IBIA at 172; *see also South Dakota*, 39 IBIA at 305-06. The U.S. Supreme Court has determined that the Tribe’s reservation is diminished, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357-58 (1998), and Appellants do not dispute the location of the Travel Plaza within the original Reservation boundaries. Therefore, the Regional Director properly considered the fee-to-trust acquisition of the Travel Plaza to be an on-reservation acquisition.

Conclusion

We therefore conclude that the supplemented record before the Regional Director demonstrates that he considered each of the relevant factors in 25 C.F.R. § 151.10 and that his decision represents a reasonable exercise of his discretion. Because Appellants have not shown error in the process followed by BIA, or that the Regional Director’s decision was

erroneous or reflected an improper exercise of his discretion, we affirm the Regional Director's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's decision.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Debora G. Luther
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.